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80-1777
No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID ORGELL, INC.,

Petitioner,

v.

JOSIAH WEDGWOOD & SONS, INC.,

Respondent,

and

GEARY'S STORES, INC., BACCARAT, INC., BUCCELATTI, INC., and CERALENE, INC.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether summary judgment on the basis of the statute of limitations may be granted in favor of a manufacturer of products in the face of a continuing conspiracy and concerted refusals to deal both prior to and within the limitations period and absent any indication that plaintiff's business was immediately and permanently destroyed, on the theory that repeated refusals to deal over ten years subsequent to the original refusal were merely reaffirmations of the original refusal?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID ORGELL, INC.,

Petitioner,

v.

JOSIAH WEDGWOOD & SONS, INC.,

Respondent,

and

GEARY'S STORES, INC., BACCARAT, INC., BUCCELATTI, INC., and CERALENE, INC.,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner David Orgell, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 19, 1981, affirming the summary judgment of the United States District Court for the Central District of California entered on January 10, 1979, dismissing, as time barred, petitioner's complaint as against respondent Josiah Wedgwood & Sons, Inc. for violation of Sections 4 and 16 of the Clayton Act, U.S.C. §§15, 26 and Section 1 of the Sherman Act, 15 U.S.C. §1, predicated upon respondent's and defendants' alleged continuing conspiracy and concerted refusal to deal with petitioner.

OPINION BELOW

The January 19, 1981, unsigned memorandum of the court of appeals announcing the judgment at issue appears in the appendix hereto ("App.") at 1a. The court of appeals memorandum will be published as an opinion pursuant to an order of the court of appeals filed on March 16, 1981, which order appears at App. 4a. The unpublished order of the district court entered October 20, 1978, granting respondent Wedgwood's motion for summary judgment appears at App. 5a. The unpublished stipulation and order of the district court filed December 1, 1978, whereby the parties stipulated that upon affirmance on appeal of the summary judgment the district court shall dismiss the complaint with prejudice against all defendants appears at App. 8a. The unpublished order and judgment of the district court entered January 10, 1979, dismissing petitioner's complaint with prejudice and entering final judgment for respondent pursuant to Federal Rules of Civil Procedure, Rule 54(b) appears at App. 11a.

JURISDICTION

The judgment of the court of appeals sought to be reviewed by this petition was entered on January 19, 1981 and appears at App. 13a. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 Sherman Act, 15 U.S.C. §1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . ."

Section 4 Clayton Act, 15 U.S.C. §15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent. . ."

Section 4B Clayton Act, 15 U.S.C. §15b:

"Any action to enforce any cause of action under sections 15 . . . of this title shall be forever barred unless commenced within four years after the cause of action accrued. . ."

STATEMENT OF THE CASE

Petitioner David Orgell, Inc. ("Orgell"), owns several retail stores which sell silver, china and crystal in the Los Angeles, California area.[1] Respondent Josiah Wedgwood & Sons, Inc. ("Wedgwood") is in the business of selling china, dinnerware and jasperware to retail stores throughout the world. The principal competitor of Orgell in the Beverly Hills, California area, in which Orgell is located, is respondent Geary's Stores, Inc. ("Geary's"). Geary's is a customer of Wedgwood and of the other defendants.

Commencing in 1965, Wedgwood denied requests by Orgell to purchase the Wedgwood line of products, which refusal to deal was reiterated in 1968. In 1972, letters were exchanged between counsel for Orgell and Wedgwood with respect to said refusals to deal. During the years 1976-1978, Wedgwood, on two additional occasions, refused to deal with Orgell.

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[1] All facts herein are undisputed and are set forth in the court of appeals opinion below. Citations in this statement of the case are provided only for quoted portions of the opinion.

On April 16, 1978, Orgell filed a complaint against Geary's, Wedgwood and the other respondents in the United States District Court for the Central District of California for violation of Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 and Section 1 of the Sherman Act, 15 U.S.C. §1, alleging that respondent and defendants had conspired with each other and with Geary's not to sell their products to Orgell and agreed to favor Geary's in connection with the sale of their products.

On August 18, 1978, Wedgwood filed a motion for summary judgment, invoking the provisions of Section 4B of the Clayton Act, 15, U.S.C. § 15b and contending that Orgell had not commenced suit within four years after the cause of action accrued.[2] On October 19, 1978, the district court granted Wedgwood's motion for summary judgment, finding that "plaintiff, as a result of Wedgwood's continuing refusals suffered no new injury. . . [and] . . . that the last act causing injury occurred as a result of Wedgwood's initial 1965 refusal to deal with the plaintiff, and that each time Wedgwood repeated the refusal, it was a reaffirmation of the original decision not to deal with the plaintiff." App. 7a.

Pursuant to stipulation of the parties and order of the district court, the district court indicated its intention to direct entry of judgment against Orgell and in favor of Wedgwood and, further, ordered that if said judgment shall be affirmed on appeal and become final, that the complaint would be dismissed with prejudice against all defendants. App. 8a-10a. On January 10, 1979, the district court entered an order and judgment dismissing the complaint with prejudice as to Wedgwood and entering final judgment for Wedgwood pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. App. 11a-12a.

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[2] In support of and for purposes of its motion, Wedgwood relied solely upon and adopted the limited facts adduced through the deposition testimony of David Orgell, President of petitioner, App. 14a-16a, and affidavits of attorneys regarding the above-described exchange of letters.

On January 19, 1981, the United States Court of Appeals for the Ninth Circuit affirmed. App. 1a-3a. Said court held that "any injury to Orgell resulted from Wedgwood's 1965 refusal to sell," App. 3a, and that, therefore, the district court correctly concluded that Orgell's action was time barred.

REASONS FOR GRANTING THE WRIT

This case involves matters of substantial importance concerning the application of the antitrust laws, specifically, the propriety of transforming the statute of limitations with respect to admitted continuing conspiracy and refusals to deal from a statute of repose to one of continued, interminable immunity. By the judgment and opinion sought to be reviewed in this petition, the Ninth Circuit has effectively held that a plaintiff which suffers continuing damage from a continued exclusion from the market is barred not only from proving violations and damages more than four years old, but is barred forever from complaining of this continuing unlawful conduct.

In so ruling, the Ninth Circuit may have placed itself squarely in conflict with its own precedential opinions as well as those of the Third, Fifth and Eighth Circuits, which have held that continuing refusals to deal constitute claims under the antitrust laws unless the pre-limitations refusal to deal results in the immediate and permanent destruction of plaintiff's business. Additionally, the opinion and judgment below ignores the principle established by this Court that the antitrust laws were enacted to redress antitrust harm and protect competition, not competitors. Restoring a uniformity among the circuits and reiterating this well established principle warrants this Court's plenary review of the ruling below.

I. The Court of Appeals, In Affirming the Granting of Summary Judgment by the District Court on the Basis of the Statute of Limitations, May Have Ignored its Own Precedents, and Misapplied the Limitations Statute to Grant the Respondent an Interminable Immunity from the Anti-trust Laws.

The Ninth Circuit held below that "here, any injury to Orgell resulted from Wedgwood's 1965 refusal to sell." App. 3a. As a basis for this ruling, the court of appeals, ignoring all cases cited by the district court, cited and misapplied to this proceeding only one case, *In Re Multidistrict Vehicle Air Pollution v. General Motors Corp.*, 591 F.2d 68 (9th Cir.), *cert. denied* 444 U.S. 900 (1979). In *In Re Multidistrict*, a manufacturer of air pollution control devices brought an action against several automobile manufacturers alleging a conspiracy to refuse to purchase plaintiff's product. Plaintiff alleged overt acts on the part of defendants in furtherance of a conspiracy to exclude it from the market both prior to and during the four year limitations period. The court of appeals in *In Re Multidistrict* found that "nothing in the record indicates other than that the 1964 decisions [not to purchase after-burner devices from plaintiff] were irrevocable, immutable, permanent and final. For this reason, all injury to plaintiff necessarily results from the 1964 rejection from the Smog Burner." 591 F.2d at 68.

At issue were smog control devices for the 1966 car model year. The court of appeals listed numerous facts indicating that plaintiff itself was convinced that it was out of the market for that model year. "Appellees had indicated clearly and irrevocably an intent to look to their own devices or modifications thereof for the 1966 model year. . . . The record indicates that AMF itself was convinced by the last quarter of 1964 that it was out of the market." 591 F.2d at 72. Recognizing that the record had demonstrated that plaintiff's opportunity to enter the market was necessarily precluded by time and that plaintiff's actions reflected that fact, the court of appeals concluded that

subsequent contacts by AMF were "forlorn inquiries by one all of whose reasonable hopes had been previously dashed." 591 F.2d at 72. The Ninth Circuit, in the opinion below, quoted this identical language and reached the same conclusion. App. 3a.

In *In Re Multidistrict, supra* the court of appeals discussed in detail and followed the well defined law on this issue as articulated in several opinions of the Fifth Circuit Court of Appeals. Specifically, the Ninth Circuit in *In Re Multidistrict* quoted at length from *Poster Exchange, Inc. v. National Screen Service Corp.* 517 F.2d 117 (5th Cir.), *cert. denied* 423 U.S. 1054 (1976), wherein an alleged conspiracy had excluded plaintiff from access to supplies for a period stretching beyond the four year limitations period. In *Poster Exchange, supra* the Fifth Circuit stated:

> ". . . Where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitations period and upon the initial act.
>
> * * *
>
> ". . . Here, Poster complains that during the four-year period sued upon, it has been continually injured by Columbia's and National Screen's conspiratorial foreclosure of Poster from access to supplies. Under *Zenith* [*Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321 (1971)] we are obliged to recognize Poster's continually accruing cause of action during this period.
>
> "Moreover, aside from the conclusive effect of these authorities, any other result here would, we think, improperly transform the limitations statute from one of repose to one of continued immunity. For according to Columbia's argument, a plaintiff who suffers continuing damage from the continued invasion of a monopoly and exclusion from

> the market is barred not only from proving violations and damages more than four years old, but is barred forever from complaining of the continuing excuse [sic] of the unlawful conduct." 517 F.2d at 126-127.

Accordingly, the Fifth Circuit remanded for a determination as to "whether there was, during the period sued upon, a mere absence of dealing, or whether there was some specific act or word precluding [plaintiff] from obtaining supplies from [defendant]." *Id.*[3]

The court below failed to recognize the crucial distinction between the "irrevocable, immutable, permanent and final," refusal of *In Re Multidistrict*, and refusals, which "while perhaps unequivocal [were] not of necessity permanent. . . ." *Poster Exchange, supra* at 127. Permanency with respect to refusals to deal clearly does not refer to the emphatic nature of the refusing party's negative response, but rather situations "where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, . . ." *In Re Multidistrict, supra* at 72, quoting *Poster Exchange, supra* at 126-127.

The undisputed evidence before the district court in this proceeding consisted solely of deposition testimony of Orgell which Wedgwood adopted, for purposes of its summary judgment motion, as a statement of undisputed facts. App. 14a-16a. These "facts" merely set forth the continuing refusals to deal by virtue of the continuing conspiracy between Wedgwood and Geary's. They in no manner demonstrate that the "violation is final at its impact," that "plaintiff's business [was] immediately and permanently destroyed," or that the "actionable wrong [undertaken by Wedgwood and Geary's] is by its nature permanent at initiation without further acts, . . ." *In Re Multidistrict, supra* at 72. All that is demonstrated by these facts is Wedgwood's repeated negative response to Orgell's request to purchase products, not the permanent denial of a

[3] As the undisputed facts demonstrate, far from conceding that it was out of the market, Orgell continued to make requests to purchase and was met with refusals within the limitations period. App. 14a-16a.

limited business opportunity or the destruction of Orgell's business. Quite clearly, the court of appeals' reliance upon *In Re Multidistrict*, in which plaintiff had only a limited opportunity to sell its goods which, when refused, was gone forever, is misplaced and ignores the precedent set by the case and the *Poster Exchange* decision upon which it is predicated. It leaves Wedgwood free to continue the conspiracy into the interminable future.

The instant case may also be contrary to the Ninth Circuit's most recent ruling in *Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188 (9th Cir. 1980), on the propriety of granting summary judgment on the basis of the statute of limitations in a concerted refusal to deal situation. Plaintiff in *Program Engineering* filed an antitrust action alleging restraint of trade, monopolization and improper refusals to deal. The district court dismissed on the basis, *inter alia*, of the statute of limitations. The Ninth Court reversed on that issue and stated:

> "Having established that [defendant] committed certain overt acts within the limitation period, the appellants could avert a summary judgment by showing that there is a genuine issue of material fact relevant to whether the acts are antitrust violations." 634 F.2d 1194.

See also, Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d. 1264, 1270 (1975), wherein the Ninth Circuit rejected the statute of limitations defense quoting this Court's statement in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 329 U.S. 481 (1968), "We are not dealing with a violation which, if it occurs at all must occur within some specific and limited time span. [Citation omitted.] Rather, we are dealing with conduct which constitutes a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm. . ." *Hanover Shoe, supra* at 502 n.15.

Petitioner submits that while *In Re Multidistrict, supra* cites and is consistent with the Fifth Circuit's *Poster Exchange, supra* decision, and while *Poster Exchange* unquestionably

supports petitioner, the court below ignored *Poster Exchange*, decisions of other circuits and also its own *Twin City, supra* opinion only to misapply the unique and limited facts of *In Re Multidistrict* to the more mundane refusal to deal facts of this case. Under such circumstances, summary judgment was improperly affirmed by the court below.

II. The Ninth Circuit's Application of the Statute of Limitations Conflicts With Decisions of the Third, Fifth and Eighth Circuits.

As set forth hereinabove, the Fifth Circuit Court of Appeals has adopted the general rule that a new cause of action accrues with each injurious act committed against an antitrust plaintiff. *Poster Exchange, supra; see also Imperial Point Colonnades Condominium v. Mangurian*, 549 F.2d 1029, 1042 & n. 22 (5th Cir.), *cert. denied* 434 U.S. 859 (1977); *Braun v. Berenson*, 432 F.2d 538 (5th Cir. 1970). The Third Circuit Court of Appeals in *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127 (3rd Cir. 1978) specifically adopted the position of the Fifth Circuit and quoted at length from the *Poster Exchange* and *Imperial Point* decisions. 587 F.2d at 139 & n. 44, 45.

In *Pioneer Co., Inc. v. Talon, Inc.* 462 F.2d 1106 (8th Cir. 1972), Associate Justice Tom C. Clark, sitting by designation, authored an opinion which held that notwithstanding pre-limitations period refusals to deal, the subsequent refusals of two orders placed by plaintiff within the limitations period "were a separate cause of action and in light of the continuing conspiracy were not barred by the statute. . ." 462 F.2d at 1108.

It is evident that the court below in this proceeding may have not only misapplied and ignored Ninth Circuit precedents, but issued an opinion conflicting with the Third, Fifth and Eighth Circuits regarding the application Section 4B, 15 U.S.C. §15b of the Clayton Act to refusal to deal situations. The

impact of this section upon continuing conspiracies and refusals to deal must not be permitted to vary from circuit to circuit, since the inevitable result is a crazy-quilt application of the antitrust laws throughout the nation. To achieve the requisite minimum of nationwide uniformity among the circuits, this Court should grant certiorari.

CONCLUSION

The court below, in a rather preemptory manner, affirmed the dismissal of an antitrust complaint by its mechanical and incorrect application of one recent case in the same circuit. By so doing, the Ninth Circuit Court of Appeals ignored the continuing antitrust violations resulting from the concerted refusal to deal, *i.e.*, the continuing injury to competition, not merely a continuing pecuniary injury to plaintiff. By giving the statute of limitations provision of the Clayton Act an interpretation contrary to its own precedents and that of other circuits, the Ninth Circuit Court of Appeals left matters in a posture clearly calling for this Court's review. Moreover, by employing the limitations statute to immunize repetition or continuation of violations, the opinion of the court below not only extends the statute beyond its purpose, but also conflicts with the policies of vigorous enforcement of public rights through private antitrust actions. For this reason, and for all the foregoing reasons, David Orgell, Inc., prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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April 20, 1981.

No. 79-3108 D.C. No. 78-1349

[Stamped filed January 19, 1981]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID ORGELL, INC.
Appellant,
v.
GEARY'S STORES, INC.; BACCARAT, INC.; BUCCELATTI, INC.; and CERALENE, INC.,
Defendants,
and
JOSIAH WEDGWOOD & SONS, INC.,
Appellee.

MEMORANDUM

Appeal from the United States District Court
for the Central District of California
Harry Pregerson, District Judge, Presiding
Argued and submitted, December 5, 1980

Before: CHAMBERS and TANG, Circuit Judges, and SOLOMON,* District Judge.

David Orgell, Inc. (Orgell) appeals from a summary judgment for Josiah Wedgwood & Sons, Inc. (Wedgwood). We affirm.

Orgell owns several retail stores which sell silver, china, and crystal in the Los Angeles area. Wedgwood sells china, dinnerware, and jasperware to retail stores in many parts of the world. Orgell's principal competitor in Beverly Hills is Geary's Stores, Inc. (Geary's), one of Wedgwood's customers. Orgell

* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

contends that Wedgwood refused to sell to Orgell as the result of a conspiracy between Wedgwood and Geary's.

Wedgwood first refused to sell to Orgell in 1965. It again refused to sell to Orgell in 1968. In 1972, Orgell retained a well-known Los Angeles law firm which wrote Wedgwood that its refusal to sell to Orgell had antitrust implications. Wedgwood's attorney denied that Orgell had any grounds for complaint. On at least two occasions in 1976 and 1977, Orgell requested the opportunity to buy the Wedgwood line, but both times Wedgwood refused to sell.

On April 16, 1978, Orgell filed this action in the district court. It alleged that Wedgwood together with Geary's had violated Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, and Section 1 of the Sherman Act, 15 U.S.C. § 1.

Wedgwood filed a motion for summary judgment. The court granted the motion on the ground that Orgell had not "commenced suit within four years after the cause of action accrued." Section 4B of the Clayton Act, 15 U.S.C. § 15b

In this appeal, Orgell concedes a four year statute of limitations but it contends that this period had not elapsed because each of Wedgwood's refusals to sell was a separate antitrust violation.

In *In re Multidistrict Vehicle Air Pollution* v. *General Motors Corp.*, 591 F.2d 68 (9th Cir. 1979), *cert. denied,* U.S. (1980), a manufacturer of air pollution control devices brought an action against several automobile manufacturers alleging a conspiracy to refuse to purchase the plaintiff's product. The plaintiff filed its action more than four years after the initial refusal to deal but alleged that the statute of limitations did not apply because each subsequent refusal created a new cause of action. The court rejected that argument, stating:

> Nothing in the record indicates other than that the 1964 decisions, as to AMF, were irrevocable, immutable, per-

manent and final. For this reason, all injury to AMF necessarily resulted from the 1964 rejection of the Smog Burner.

Id. at 72.

Here, any injury to Orgell resulted from Wedgwood's 1965 refusal to sell. Orgell's subsequent requests "were forlorn inquiries by one all of whose reasonable hopes had been previously dashed." *Id.* The district court's order granting summary judgment stated, "each time Wedgwood repeated the refusal, it was a reaffirmation of the original decision not to deal with the plaintiff. Since the original refusal pursuant to the alleged conspiracy occurred over a dozen years ago, this action is time-barred by the four year statute of limitations." We agree.

The district court's order granting summary judgment on the ground that Orgell's action is time-barred is

AFFIRMED.

No. 79-3108 D.C. No. 78-1349

[Stamped filed March 16, 1981]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID ORGELL, INC.,
Appellant,
v.
GEARY'S STORES, INC.;
BACCARAT, INC.;
BUCCELATTI, INC.,
and CERALENE, INC.,
Defendants,
and
JOSIAH WEDGWOOD & SONS, INC.,
Appellees.

ORDER

Before: CHAMBERS and TANG, Circuit Judges, and SOLOMON,* District Judge

Pursuant to a request of the panel, it is hereby ORDERED that the Memorandum disposition entered herein on January 19, 1981, be published as an authored Opinion by Judge Solomon.

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Civil No. 78-1349-HP

[Stamped filed October 19, 1978]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID ORGELL, INC., *Plaintiff,* v. GEARY'S STORES, INC., et al., *Defendants.*	ORDER GRANTING DEFENDANT WEDGWOOD'S MOTION FOR SUMMARY JUDGMENT

This matter is before the court on defendant Wedgwood's motion for summary judgment. Having considered the pleadings, the memoranda of law, and the oral argument of counsel heard on September 18, 1978, the court concludes that Wedgwood's motion for summary judgment should be granted.

The court notes that plaintiff did not comply with Local Rule 3(g)(2) providing that any party opposing a motion for summary judgment shall "serve and file a concise 'statement of genuine issues' setting forth all material facts to which it is contended there exists a genuine issue necessary to be litigated." Plaintiff, however, did file a statement asserting that defendant's contentions of fact are insufficient to support its motion.

In *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968), the Supreme Court stated that a plaintiff opposing a motion for summary judgment in an antitrust action cannot merely rest on the allegations contained in his complaint; he must produce significant probative evidence to support his allegations. In addition, Local Rule 3(g)(3) provides:

> In determining any motion for summary judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion.

Plaintiff filed no affidavits contesting the facts set forth by defendant. Therefore, this court, in the absence of contrary factual assertions, will treat as true the facts asserted by defendant.

Section 4B of the Clayton Act, 15 U.S.C. 15(b), provides that any action to recover treble damages in a private antitrust suit must be commenced within four years after the cause of action has accrued. The accepted rule is that a cause of action for civil conspiracy under the antitrust laws accrues on the date the last act causing injury or damage was committed. *Garelick v. Goerlich's, Inc.*, 323 F.2d 854 (6th Cir. 1963); *Steiner v. 20th Century-Fox Films Corp.*, 232 F.2d 190 (9th Cir. 1952); *Manok v. Southeast District Bowling Association*, 306 F.Supp. 1215 (C.D. Cal. 1969). In *Steiner*, the court held that when a plaintiff alleges a continuing conspiracy causing continuing damage, the statute of limitations runs from the time "the blow which caused the damage was struck." Any injury occurring after the "blow is struck" is not relevant to the issue of when the statute of limitations commences to run, but rather affects only the problem of how much should be allowed in damages. *Steiner*, 232 F.2d at 194-95. The period of limitation is not extended merely because damages from the injury may be continuing. *Saunders v. National Basketball Association*, 348 F.Supp. 649 (N.D. Ill. 1972). Where the alleged antitrust violation involves several refusals to deal, most courts, in determining when the cause of action accrued, distinguish between a final refusal that is subsequently reiterated and subsequent refusals that themselves cause new injury. C. Hills, *Antitrust Adviser* § 11.13, at 710 (2d ed. 1978).

In this action, plaintiff alleges that defendants conspired not to sell their products to plaintiff but to favor Geary's Stores. Wedgwood's initial refusal to sell to plaintiff pursuant to an alleged conspiracy occurred in 1965. Plaintiff contends that at least ten years ago, it again sought to acquire Wedgwood products but was rebuffed. Moreover, in 1972, the law firm of O'Melveny and Myers was retained by plaintiff to pursue its alleged antitrust claim involving Geary's and Wedgwood. The

law firm wrote to Wedgwood and pointed out the possible antitrust implications of its conduct. Wedgwood replied, denying all charges. During the last two years, plaintiff on two occasions sought the opportunity to buy products from Wedgwood and was again refused. Plaintiff undertook no further action until April 16, 1978 when it filed its complaint. Plaintiff, as a result of Wedgwood's continuing refusals, suffered no new injury. Rather, the amount of monetary loss allegedly sustained by plaintiff from the original 1965 refusal simply increased over the years.

The court finds that the last act causing injury occurred as a result of Wedgwood's initial 1965 refusal to deal with the plaintiff, and that each time Wedgwood repeated the refusal, it was a reaffirmation of the original decision not to deal with the plaintiff. Since the original refusal pursuant to the alleged conspiracy occurred over a dozen years ago, this action is time-barred by the four year statute of limitations.

THEREFORE, IT IS ORDERED that defendant Wedgwood's motion for summary judgment be granted.

The Clerk of the Court shall serve copies of this Order, by United States mail, upon the attorneys of record for the parties appearing in this action.

Dated: October 19, 1978.

HARRY PREGERSON

Harry Pregerson
United States District Judge

No. 78-1349 HP

[Stamped filed December 1, 1978]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID ORGELL, INC., *Plaintiff,* vs. GEARY'S STORES, INC. *Defendants*	STIPULATION AND ORDER

WHEREAS:

A. By Order entered October 20, 1978, the Court granted defendant Josiah Wedgwood & Sons, Inc.'s Motion for Summary Judgment on the grounds that the claims asserted in the Complaint against said defendant are barred by the Statute of Limitations;

B. Said Order is not appealable unless the Court makes the determination required under Rule 54(b) of the Federal Rules of Civil Procedure;

C. Plaintiff agrees to dismiss the Complaint with prejudice against all defendants herein when, as and if the dismissal in favor of Defendant Wedgwood becomes final. There is, therefore, no just reason for delay because if the Court's Order entered October 20, 1978 is affirmed, plaintiff will dismiss this action with prejudice as to all defendants;

D. There is now pending plaintiff's motion re discovery originally set for November 6, 1978, continued to November 20, 1978, and then to December 4, 1978.

E. Plaintiff has noticed its depositions to be taken in New York in January, 1979 and has indicated that it intends to obtain other discovery in aid of the said depositions against all

defendants. There is pending and set for December 11, 1978, a Pretrial Conference; but the parties have not completed their discovery, a great deal of it on both sides remaining to be taken if the cause is to be tried before appellate review of the aforementioned Order;

F. The parties are desirous of saving themselves and the Court a great deal of what may be unnecessary work and cost and are desirous of having the Court certify an appeal of the Court's Order under Rule 54(b) of the Federal Rules of Civil Procedure, so there will be no further proceedings in this Court until the appeal is decided.

NOW, THEREFORE, IT IS STIPULATED by and among the attorneys for the respective parties, and by David Orgell, Inc. subject to the approval of the Court, as follows:

1. The Court, in a separate order, may make its express determination that there is no just reason for delay and may expressly direct the entry or judgment against the plaintiff in favor of the defendant Josiah Wedgwood & Sons, Inc.;

2. All proceedings in the trial court including but not limited to depositions and other discovery shall be stayed pending plaintiff's appeal from the said judgment duly and timely made;

3. If the said judgment shall be affirmed on appeal and become final, the Court shall dismiss the Complaint herein with prejudice against all defendants and each party shall bear its own costs.

4. In all other events the action shall proceed in the United States District Court herein.

SCHWARTZ, ALSCHULER & GROSSMAN
MARSHALL B. GROSSMAN
JANIS E. ADAMS

By JANIS E. ADAMS

Attorneys for Baccarat, Inc.,
Buccelatti, Inc. and
Ceralene, Inc.

LATHAM & WATKINS
PHILIP BELLEVILLE
ALAN CLARK

By ALAN B. CLARK

Alan Clark
Attorneys for Geary's, Inc.

MITCHELL, SILBERBERG & KNUPP
EDWARD MEDVENE
ROY SHULTS

By ROY SHULTS

Roy Shults
Attorneys for Josiah Wedgwood & Sons, Inc.

LAW OFFICES OF BERNARD REICH

DAVID ORGELL, INC.
By DAVID ORGELL

By BERNARD REICH

Bernard Reich
Attorney for David Orgell, Inc.

IT IS SO ORDERED.

DATED: DEC. 1, 1978

HARRY PREGERSON

United States District Judge

No. 78-1349-HP

[Stamped filed January 9, 1979]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID ORGELL, INC., *Plaintiff*, vs. GEARY'S STORES, INC.; JOSIAH WEDGWOOD & SONS, INC., BACCARAT, INC.; BUCCELATTI, INC.; and CERALENE, INC., *Defendants*.	ORDER AND JUDGMENT

This matter came on for hearing before the Court, the Honorable Harry Pregerson, United States District Judge, presiding, on the motion of defendant Josiah Wedgwood & Sons, Inc. ("Wedgwood") for summary judgment. The Court having considered the pleadings, the memorandum of law, and the oral argument of counsel heard on September 18, 1978, the Court issued its order granting Wedgwood's motion for summary judgment ("Order") which was entered on October 20, 1978.

Pursuant to the stipulation executed by counsel for all parties herein, filed with the Court on December 1, 1978, and signed by the court on December 1, 1978, the Court finds that there is no just reason for delay of the entry of a final judgment as to defendant Wedgwood, and it is

ORDERED, ADJUDGED AND DECREED:

1. That plaintiff David Orgell, Inc. shall take nothing by its complaint herein against defendant Wedgwood, and that the complaint is dismissed with prejudice as to said defendant;

2. Each party shall bear its costs of suit herein; and

3. The Court, expressly determining, under Rule 54(b) FRCP, that there is no just reason for delay in entering final judgment for defendant Wedgwood hereby expressly directs that final judgment in favor of said defendant and against the plaintiff be entered; and the same is hereby entered.

Dated: January 9, 1979

/s/ HARRY PREGERSON

HARRY PREGERSON
United States District Judge

JUDGMENT entered.

DATED:

_____

Clerk

No. 79-3108 DC CV 78-1349 HP

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID ORGELL, INC.,

Appellant,

vs.

GEARY'S STORES, INC.; BACCARAT, INC.; BUCCELATTI, INC.; and CERALINE, INC.,

Defendants,

and

JOSIAH WEDGWOOD & SONS, INC.,

Appellee.

APPEAL from the United States District Court for the CENTRAL District of CALIFORNIA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the CENTRAL District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and Entered January 19, 1981

No. 78-1349-HP

[Stamped filed August 18, 1978]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID ORGELL, INC.,
Plaintiff,
vs.
GEARY'S STORES, INC., JOSIAH WEDGWOOD & SONS, INC., BACCARAT, INC., BUCCELATTI, INC., and CERALENE, INC.,
Defendants.

Hearing Date: Sept. 11, 1978
Time: 10:00 A.M.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANT JOSIAH WEDGWOOD & SONS, INC.

STATEMENT OF UNDISPUTED FACTS

Solely for the purposes of this motion, and without waiving any of its rights, claims or factual positions in the event this litigation should continue, Wedgwood will take as given the testimony of plaintiff's principal, Mr. David Orgell. That testimony has led to certain uncontradicted facts.

Orgell is " . . . claiming that the defendants, Geary's, are conspiring with certain suppliers listed to exclude us from purchasing directly from them and because of that we are suffering damages." (D. Orgell Depos., p. 45, lines 8-11). Orgell originally sought the Wedgwood line " . . . at least ten years ago." (*Id.*, line 25.) On that occasion, Mr. David Orgell spoke to a Mr. Thomas of Wedgwood, who reportedly told Mr. Orgell that Wedgwood had "arrangements" in the vicinity. (D. Orgell Depos., p. 47, lines 12-13). That is to say, Wedgwood had another customer "very close to me . . . " and " . . .

didn't want another account right in that vicinity." (*Id.*, lines 15-16). Thus, Mr. Thomas refused Orgell the Wedgwood line. *Id.*, line 18.

Wedgwood's initial refusal to deal with Orgell likely occurred twelve or thirteen years ago, rather than ten. Mr. Orgell testified that a Mr. Donald Rose, who was Wedgwood's salesman for the "Beverly Hills territory", refused to supply Mr. Orgell and his store in 1965-1966. Mr. Orgell testified that Mr. Rose said: "Well, you know the relationship between Wedgwood and Geary's. I only work for the company, and I have been told not to sell you." (D. Orgell Depos., p. 134, line 28, to p. 135, line 2.)

In early 1972, more than six years before this lawsuit was filed, William J. Feis, Esq., of O'Melveny and Myers wrote a letter to Wedgwood's President, Mr. R. M. Smyth, on behalf of Orgell. Affidavit of Raymond M. Smyth in Support of Motion by Defendant Josiah Wedgwood & Sons, Inc. for Summary Judgment, ¶ 2 and Exhibit A ("Smyth Affidavit"). [2] In that letter, Mr. Feis asserted that Mr. Rose of Wedgwood had " . . . stated that he will not sell the Wedgwood line to Mr. Orgell because of an agreement with Geary's not to do so." Adding that his firm was " . . . unable to imagine a valid business reason" for Wedgwood's refusal to sell its line to Orgell, Mr. Feis noted that " . . . our attention has accordingly been drawn to the possible antitrust implications of your conduct." He expressed his belief that it was in the interest of all concerned " . . . that this matter not be allowed to result in litigation." (Smyth Affidavit, Exhibit A).

Mr. Smyth referred Mr. Feis's letter to Wedgwood's counsel, Mr. Leonard S. Sandweiss, for reply. Smyth Affidavit, ¶ 3; Affidavit of Leonard S. Sandweiss in Support of Motion by Defendant Josiah Wedgwood & Sons, Inc. for Summary Judg-

[2] The "affidavits" of Messrs. Smyth and Sandweiss are in fact declarations proper under 28 U.S.C. § 1746. In the interest of time and after telephonic consultation with the clerk of the court, the titles have been left as they are. References to their "affidavits" should therefore be understood as referring to what are in reality declarations.

ment, ¶ 2 and Exhibit A ("Sandweiss Affidavit").[3] Mr. Sandweiss replied in writing to Mr. Feis's letter on or about March 6, 1972. Sandweiss Affidavit, ¶ 3 and Exhibit B. In his letter he denied the charges made by Mr. Feis, even assuming the accuracy of Mr. Feis's factual representations. Sandweiss Affidavit, Exhibit b, page 2. Yet, despite the litigation threat contained in the letter from Mr. Feis to Mr. Smyth, neither Mr. Sandweiss nor Wedgwood ever heard from Orgell or its counsel O'Melveny and Myers again on these matters. *See* Sandweiss Affidavit, ¶ 4; Smyth Affidavit, ¶ 4.

During the last two years ago, Orgell *again* sought the opportunity to buy Wedgwood on two more occasions. (D. Orgell Depos., p. 56, line 22 to p. 58, line 18; p. 48, line 17-p.50, line 18.) Orgell contends that Wedgwood again refused to sell its line to Orgell, at least in part because of Geary's. (*Id.*, p. 52, lines 8-17; 53, line 28-p. 54, line 8; p. 51, lines 1-25.)

The harm Orgell allegedly has suffered as a result of the actions of the defendants is that Orgell has " . . . been denied product, product that we would have made profits on, and the customer that would have come to us for the product had to go to Geary's; thus, we suffered damage." (D. Orgell Depos., p. 92, lines 6-9.) Approximately a year ago, Orgell began to acquire Wedgwood's bone china and jasperware from a source other than Wedgwood, and to sell these items to its retail customers. (D. Orgell Depos., p. 27, lines 1-14.) However, Orgell has used its Wedgwood products as loss leading items and has made literally no profit on its sales of Wedgwood. (D. Orgell Depos., p. 106, lines 17-25.)

Orgell does not break down its gross sales or costs, or its net sales on china, crystal or silver, classified as such. Rather, Orgell has total sales, total gross and total net figures on its overall business. (D. Orgell Depos., p. 116, line 12-p.117, line 12.) On its overall business, Orgell has shown a profit—an increasing profit—in each of at least the last 10 years. (D. Orgell Depo., p. 86, lines 16 p. 87, lines 3-7 and 20-21.)

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[3] *See* footnote 2.